

Fordham International Law Journal

Volume 19, Issue 1

1995

Article 1

The Challenge of Asian Law

Whitmore Gray*

*

Copyright ©1995 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

The Challenge of Asian Law

Whitmore Gray

Abstract

Several years ago, when U.S. trade across the Pacific finally surpassed that across the Atlantic, a small group of U.S. lawyers were already responding to the challenge of representing clients in transactions in Asia. While few had had the opportunity to take courses dealing with Asian law during their law school years, many entered the field because of undergraduate language and area studies courses. The challenges seem clear: improve the quantity, and especially the variety, of courses on Asian law; bring Asia into the mainstream of American teaching wherever possible - hopefully as a result of having involved American non-specialist teachers in research about, or teaching in, Asia; continue to support teachers who want to move into an Asian specialization, recognizing the magnitude of the commitment to language study and in-country experience that at least a few scholars will make; and encourage the creation of an even better body of scholarship on Asia, including some sophisticated introductory texts.

INTRODUCTION

THE CHALLENGE OF ASIAN LAW

*Whitmore Gray**

Several years ago, when U.S. trade across the Pacific finally surpassed that across the Atlantic, a small group of U.S. lawyers were already responding to the challenge of representing clients in transactions in Asia. While few had had the opportunity to take courses dealing with Asian law during their law school years, many entered the field because of undergraduate language and area studies courses. A few had taught courses dealing with Asia before beginning their law studies.

Some of these U.S. lawyers began their Asian practice experience as editors of English in Japanese law offices and companies. In other cases, law graduates with Chinese language ability went directly into U.S. law firms in and near China, even before they had obtained any experience in the United States. Still others went into foreign law firms in Korea, Taiwan, Thailand, Indonesia, and Vietnam. In addition to those working in the growing number of Asian offices of U.S. law firms, there are now several hundred Americans working in non-U.S. firms. To appreciate the size of the practice area, however, we must include the thousands of U.S. lawyers who deal with inbound work for Asian clients, or help their U.S. clients find legal assistance in Asia.

We see now, fairly clearly, that Asia is an area of practice for which prospective lawyers can and probably should receive special training. We also see that it is an area of practice where various kinds of legal scholarship are needed, and where countries are eager to have Americans help in the evolution of their legal systems. In fact, cross-border Asian practice is now an internationally recognized field, as testified to by the four international professional associations of lawyers in the Pacific area that have begun to meet regularly. The most recent meeting of the

* Emeritus Professor, University of Michigan Law School; Of Counsel, LeBoeuf, Lamb, Greene & MacRae, New York; Visiting Professor of Law, Fordham University School of Law.

oldest of these organizations, Lawasia, in Beijing, drew over 1000 lawyers from the region. Whereas U.S. firms once dominated the field, now some of the largest overseas offices are non-U.S. Another sign of the times is that some Japanese business and law offices in China are staffed by Chinese-speaking Japanese who do not speak English, so the U.S. advantage as masters of the *lingua franca* is no longer guaranteed. Perhaps it is a good time, therefore, to assess the challenges to U.S. legal education and legal literature, and to the U.S. legal profession's role as mentor in the area of Asian practice and law:

1. Law schools should do a better job in preparing their students to participate effectively in Asian practice.
2. Law professors and others contributing to U.S. legal literature should include what is happening in Asian law and legal systems in their scholarly work in various areas of the law.
3. U.S. lawyers and professors should make an effective contribution to the development of new Asian legal systems and the modernization of those already established.

Let us look at each of these challenges in the light of past experience, and express some hopes for the future.

1. Preparing Students to Participate in Asian Legal Practice

Probably only ten percent of U.S. law students are at schools offering an Asian law course, and at schools with such offerings, the enrollment does not normally exceed ten percent of the student body. Some schools may develop a sequence of courses, but we must start from the assumption that U.S. law schools rarely set up a "program" to prepare students for any practice specialty. Course offerings are dictated in large part by the interests of the faculty, so it is largely in discussing Points Two and Three above that we will find the response to Point One. What does seem clear, however, is that student demand for offerings that relate to Asian law and Asian legal systems is likely to increase as the practice continues to become more important, and as the number of students who come to law school with preparation in Asian languages and cultures continues to increase. These students, along with many Asian-American law students, may encourage their law professors to include Asian perspectives in their general courses. Many litigated cases involving Japan or China are appropriate for use in torts, civil procedure, antitrust, or bankruptcy courses. The real question is whether the profes-

sor teaching these cases will invest the time to learn about the cultural and legal context of the foreign system or party.

In fact, for most U.S. law students, preparation for dealing with clients from Asia is as important as representing Americans in outbound business matters. In a course dealing with negotiation, effective teaching about cross-cultural aspects could make a substantial contribution to student preparation for Asian practice, as well as for dealing with foreign clients in the United States.

2. Creating an Accessible and Sophisticated Literature About Asian Law and Legal Systems

The last thirty years have seen the creation of a large body of sophisticated legal literature dealing with Japan. The Harvard-Michigan-Stanford program for the training of Japanese judges, professors, and lawyers in the 1950's led to the publication of a volume of insightful studies of various areas of Japanese law,¹ each authored cooperatively by a Japanese scholar and an American collaborator. This approach produced work of uncommonly high quality and utility. Since then, an annual periodical of the same name has appeared containing sophisticated original articles and high-quality translations of major Japanese scholarly writing. A large number of other books and a multi-volume treatise on doing business in Japan have appeared, and a younger generation of American scholars are regularly publishing insightful articles on specialized topics. The literature of the last twenty years dealing with China is also very extensive. There have been several thoughtful monographs, and a very large body of descriptive articles about new laws and doing business in China.

Assuming that practitioners will continue to provide how-to books and legislative updates, what could academics contribute in the next ten years? There is a real need for sophisticated introductory texts and teaching materials that could be used effectively for self-study by students or lawyers without access to a course offering.

Point Two challenges non-specialists in Asian law to take note of sophisticated Asian ideas (e.g., from Japan) or current Asian legal developments (e.g., from China) in their writing

1. LAW IN JAPAN (A. Von Mehren ed., 1964).

about various legal questions. If non-specialists were to keep abreast of Asian ideas and developments, it is possible that these would crop up in their teaching of these concepts. There is, however, a general tendency of American law professors to focus on their already complex domestic scene as they make their scholarly contributions. Additionally, in contrast to the practice in many foreign countries, study of foreign legal systems has never been a part of mainstream law reform efforts in the United States. American scholars may feel that even the best translated foreign scholarship, or the most carefully documented exposition and insights of their own comparative scholars, seem too "secondary" to deserve serious consideration. Americans prefer to draw scholarly conclusions only from work with original sources. To respond to this preference, American scholars should try to provide non-specialists with sophisticated research associates to facilitate work with the fine collections in the United States of original-language Asian legal materials.

Whatever the reason for U.S. foot-dragging in the past, today there is reason to be optimistic that comparative law insights will be main-streamed to a much greater extent in future legal education. NAFTA has made the Mexican legal system, and even Canadian law, matters of interest to a broad range of practitioners, and we can hope that repercussions will be felt in law school commercial law, banking, and civil procedure courses. The Convention on International Sale of Goods (displacing UCC rules in many international sales since 1988), and a host of specific international agreements, impinge on the traditional, purely domestic character of various laws and rules, and will slowly work their way into the American curriculum. Perhaps American legal education will also come to include materials that will familiarize all students with world legal cultures.

If U.S. law school curricula continue to develop the academic focus of recent years, we may indeed see interest in Asian legal systems extend beyond its importance in law practice. How China's two-thousand-year-old legal tradition is being adapted to the needs of a modern industrial society is a fascinating subject of academic inquiry. The legal sociologist or anthropologist could look, for example, at the interplay in Cambodia of colonial influences, traditional culture, and socialist ideals. In almost all Asian Countries, we see examples of the challenge of integrating the "new" international legal customs of bankruptcy,

competition, tax and foreign investment laws into their traditional legal systems. In Indonesia, fifty years after its declaration of independence from Holland, the Government is now in the process of substituting new basic laws for the inherited Dutch legislation. This process raises fascinating questions about how texts can be adapted by interpretation to serve in different circumstances - just as the German Civil Code of 1900 was used under the Weimar, Third Reich, and both West and East German Governments. In the past, American comparative legal literature often concentrated on recognizable, and therefore comparable, institutions in European or Latin American countries. The greater dissimilarity of Asian law and legal systems, however, leads to comparative studies which often challenge our basic assumptions concerning the role of law and legal institutions. Perhaps in the same way that the study of Asian languages often leads to an interest in linguistics, the study of Asian legal ideas and practices may lead Americans to jurisprudential and sociological insights about law as it relates to our own society and economy.

3. Contributing to the Development and Modernization of Legal Systems in Asia

During the Nineteenth and the first half of the Twentieth Centuries, the principal migration of legal ideas was from Europe to countries attempting to create or modernize their legal systems. While some common law ideas and institutions were transplanted, or at least had some impact, the European codes were used as the principal models for creating the conceptual framework of legal systems in Latin America, European Colonial Africa, and Asia. European courts also provided the pattern for new legal institutions. France, and subsequently Germany and Switzerland, also provided the legal literature to which legal scholars in those countries would look as their new systems developed, as well as the universities to which Asian scholars would go for advanced academic study. Scholars in many of those countries recognized the value of creative techniques and helpful solutions to legal problems contributed by English and American judges, but they were discouraged by the prospect of importing the huge volume of case reports necessary to operate a common law legal system.

After the Second World War, however, a new era of global

interaction of legal systems developed. U.S. economic dominance reinforced the idea that U.S. legal institutions and, particularly, recent U.S. substantive law, should be considered as normal models for modernization. American self-confidence and parochial attitudes towards other legal systems led Americans to participate enthusiastically in the export of U.S. law and legal attitudes. Antitrust and labor law are examples of fields where the study of U.S. law, often in the United States, was the basis on which new rules were introduced and institutions developed, both in Europe and in Asia. U.S. principles of constitutional law and practice also influenced the new law and institutions in Germany, Italy, and Japan. U.S. techniques of legal education inspired many students returning from graduate study in the United States to introduce changes in the way they taught even the traditional law of their own country.

For a variety of reasons, the legal momentum of the 1950's was lost to a considerable extent in the 1960's and 1970's. To some extent, the mission had been accomplished. American graduate legal study had become a world norm — though we may not have noticed that Asian scholars in traditional fields such as civil law and procedure continued to eschew the United States for study in Germany or France. Simultaneously, the Ford Foundation's generous funding of international legal studies programs at a number of law schools, both direct and indirect, was drastically reduced, perhaps in part because the Foundation was turning its attention to what were perceived as pressing domestic problems. In fact, domestic problems became the focus of many new law faculty members, even at schools with available funds for comparative studies. Consequently, the 1950's generation of senior scholars, who added a comparative focus to their substantive work in constitutional law, procedure, administrative law, tax or criminal law, was not replicated by successor generations.

The opening of China, and the decision to recreate a formal legal system, gave a new impetus to the missionary activities of the U.S. legal community. This time, however, it included many practicing lawyers whose advisory role in the development of legal institutions and the drafting of new laws went hand-in-hand with their participation in China's economic development program. Educational programs in the United States were established for legal study by Chinese, many of whom had had no

previous legal education at home, while special funding and admission standards made it possible for many Chinese to enroll in regular graduate degree programs.

These special education programs, however, presented a formidable challenge for Chinese students that sometimes went unrecognized. Namely, how appropriate were U.S. law and legal attitudes for direct use in China? An American speaking about U.S. bankruptcy or patent law in Europe or Japan could simply present the facts and rely on the sophistication of his or her audience to pick and choose among the ideas presented as to what may be of relevance. In China, however, as was the case subsequently in Vietnam, Cambodia, Mongolia, and other countries where there had been a substantial discontinuity of sophisticated legal training, it would have been better for the speaker to learn as much as possible about the local environment in which the new legal institution was to grow, and thus would have enabled effective participation in the process of using U.S. experience to design a new local legal rule or institution.

In Asia, as in Eastern Europe, substantial institutional programs are now in place to assist in drafting new laws, creating new institutions, and training legal personnel of all kinds. The Committee on Legal Education Exchange With China ("CLEEC"), composed mostly of academics, has made a major contribution to training Chinese law professors (funded for the most part by the Ford Foundation) and in developing law library resources and training personnel (funded by the Luce Foundation). Since 1985, CLEEC has conducted a summer course in China on U.S. law, funded by the U.S. Government and other sources. In Cambodia, the American Bar Association has effectively facilitated various kinds of legal assistance. Additionally, the U.S. Agency for International Development, various United Nations agencies, and the World Bank have funded or administered other broad-ranging programs intended to enhance the effectiveness of legal institutions in Asian countries.

With a few notable exceptions, much of this work in Asia has lacked close links to U.S. law schools. Much of the teaching about U.S. law has been done by lawyers without teaching experience, or, in many cases, the luxury of time to learn about the environment and legal traditions of their audience. Hopefully the challenge of effective participation in the development of Asian legal systems will begin to find a greater response among

U.S. law teachers. Those with an interest in human rights will find Asia a place to pursue their interests, as will those focussing on intellectual property, corporate governance, or religion and the law. To the extent that law professors do become involved in sharing U.S. experiences with an Asian audience, it seems likely that the Asian experiences and perspective may find their way back into their writing and even into their teaching.

CONCLUSION

The challenges seem clear: improve the quantity, and especially the variety, of courses on Asian law; bring Asia into the mainstream of American teaching wherever possible — hopefully as a result of having involved American non-specialist teachers in research about, or teaching in, Asia; continue to support teachers who want to move into an Asian specialization, recognizing the magnitude of the commitment to language study and in-country experience that at least a few scholars will make; and encourage the creation of an even better body of scholarship on Asia, including some sophisticated introductory texts.

Americans recognize the central position of their unique institution of student-edited law reviews in the dissemination of much of this writing. Fortunately, as American law professors have seen many times in the past, the perceptive students who create and staff these journals have been ahead of their teachers in their attention to legal problems outside the United States and, as this issue shows, in welcoming through their pages the voices of non-academics. Hopefully these pieces and original student works on Asian topics, like the thoughtful treatment of modernization in Vietnam and other Asian topics in the last issue of the *Fordham International Law Journal*, will bring Asia to center stage in American legal scholarship — a position it has already assumed in the world of foreign business.